Master Plastering Company *and* Plasterers Local 2, Operative Plasterers and Cement Masons International Association, AFL–CIO and Contracting Plasterers Association of Southern California, Inc. Case 31–CA–18698

July 13, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On March 2, 1994, Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

[1] The General Counsel contends that fn. 7 of the judge's decision should be struck. In that footnote, the judge found no merit to, and dismissed, the complaint allegation that the Respondent unlawfully failed to make fringe benefit contributions at the time it unlawfully unilaterally reduced employee wages in January 1991. Apparently, the General Counsel believes that this finding conflicts with the judge's earlier finding that the Respondent unlawfully failed to make *proper* fringe benefit contributions to the Union's funds as of May 1, 1990, and continuing thereafter. We find no conflict between these findings.

The complaint alleges that beginning in May 1990, and continuing thereafter, the Respondent ''failed to make fringe benefit contributions for all hours worked by bargaining unit employees.'' The unrefuted evidence discloses, and the judge found, that during the second half of 1990 the Respondent's fringe benefit trust account with the Union exhibited an underreporting in the number of hours worked by employees and a deficiency in contributions of over $8000. The judge appropriately orders a make-whole remedy requiring that the Respondent resume paying the contractually specified payments for this ongoing violation.

A separate complaint allegation states that beginning in January 1991, the Respondent ''failed to make fringe benefit contributions for bargaining unit employees.'' There is no record evidence that as of that later date the Respondent failed to make any fringe benefit contributions whatsoever. Thus, the judge dismissed that separate allegation. The dismissal of that independent allegation in no way affects the finding of the ongoing fringe benefit fund contribution deficiency and does not curtail the make-whole aspects of the Order concerning the Respondent's underpayment of fund contributions.

We note a misstatement in the last sentence of the fourth papagraph of the ''Concluding Findings'' section of the judge's decision. The reference should be to par. 8(c) of the complaint rather than to par. 8(b).

[2] In providing for a make-whole remedy for the Respondent's unlawfully decreasing the contractually required wage rates for unit employees beginning in January l991, the judge relies on the backpay formula set forth in *F. W. Woolworth*, 90 NLRB 289 (1950), to compute the employees' loss of earnings. Because the violation involves a modification of contract and not the termination of employees, *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and not *Woolworth*, sets forth the appropriate formula to compute the backpay owed the employees here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Master Plastering Company, Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Margaret Hume, Esq., for the General Counsel.
Stanley Sklute, Esq., of Los Angeles, California, for the Respondent.
Roger Frommer, Esq., of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On a charge filed by Plasterers Local 2, Operative Plasterers and Cement Masons International Association, AFL–CIO (the Union) against Master Plastering Company (the Respondent), the Regional Director for Region 31 issued a complaint and notice of hearing on April 18, 1991. The substantive allegations of the complaint allege the Respondent is a member of an Employer Association and, by virtue of this membership, is party to a collective-bargaining agreement with the Union, effective from August 1, 1990, to and including August 2, 1994. Further, that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by engaging in the following conduct: (1) Since on or about May 1, 1990, failing and refusing to pay contractually required wages and failing to make fringe benefit contributions for all hours worked by bargaining unit employees;[1] (2) since on or about January 7, 1991, unilaterally reducing contractually required wage rates and failing to make fringe benefit contributions for bargaining unit employees; and (3) since late September 1990, bypassing the Union and dealing directly with unit employees by telling the employees they would be required to take a reduction in pay, would receive their wages in cash, and fringe benefit contributions would not be made on their behalf.

A hearing was held in this matter on January 5, 1993, in Los Angeles, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. All counsel gave oral arguments at the conclusion of the hearing, and the arguments have been fully considered in arriving at this decision.

On the entire record in this matter, I make the following

[1] The appropriate bargaining unit is described as follows:

All employees of Respondent engaged in plastering and associated work as more fully described in the collective-bargaining agreement between the Association and various Plasterers' Local Unions, herein MLA, effective July 21, 1987 to July 31, 1990 [as modified by the Memo Agreement, effective August 1, 1990, to and including August 2, 1994], excluding all other employees, guards and supervisors as defined in the Act.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Master Plastering Company, is a California company in the building and construction industry, specifically engaged in the plastering business. Respondent is, and has been at all times material, a member of the Contracting Plasterers Association of Southern California, Inc. (the Association) an organization composed of employers engaged in the building and construction industry. One of the purposes of the Association is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. During the last calendar or fiscal year the employer-members of the Association, including but not limited to the Respondent, have annually purchased and received goods or services in excess of $50,000, in the course and conduct of their business operations, from sellers or suppliers located within the State of California who in turn obtained such goods and materials directly from sources outside the State of California. Accordingly, I find Respondent Master Plastering Company is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union, Plasterers Local 2, Operative Plasterers and Cement Masons International Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Steven B. Jones, a member of the Union, worked for the Respondent from August 1989 until the end of the first week in January 1991. Although a union member, Jones was a foreman for the Respondent and supervised a crew of approximately seven or eight unit employees. The uncontroverted testimony in the record establishes that in his capacity as foreman, Jones was a supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act.[2]

The unrefuted testimony indicates that sometime in May 1990, the Respondent altered the manner by which it paid the employees their wages. Jones stated that prior to May, the employees received their weekly wages solely in the form of a check showing all the deductions from the gross amount earned.[3] He testified that starting in May 1990, each employee, including himself, received their weekly wages partly in the form of cash and partly by check. Nor was this method of payment consistent. On occasion, the employees would be paid totally in cash. According to Jones, when the payments were partly by check and cash, the check portion only reflected the hours worked commensurate with the face amount of the check. The cash portion, which always was in a sealed envelope, carried no notation of the hours it represented nor was there any indication of the deductions. When the wages were entirely in cash, there was no notation whatsoever except for the amount each envelope contained. Jones further stated that during his employment with the Respondent, his crew normally worked 40-hour weeks, except for occasional downtime due to inclement weather or equipment breakdown.

Jones' testimony concerning the change in the payment of wages was corroborated by Fernando Lara, a member of Jones' crew. Lara's unrefuted testimony tracked that of Jones. It is evident from the testimony that neither of these employees were concerned about the method of payment since each felt he was receiving the net pay he was entitled to for the hours worked. Nor is there any indication in the record that any of the other employees complained or brought the method of payment to the Union's attention. Indeed, Jones testified he felt his compensation in these circumstances was ''fair.''

At some point in the latter part of December 1990, the precise date is not clear in the record, William Mays, the Respondent's superintendent, spoke to Jones about decreasing the employees' wages.[4] According to Jones, Mays told him the wages had to be lower than the contract wages in order for the Respondent to remain competitive. Mays stated that Jones' hourly wage would be reduced from $21 to $16 and the unit employees would be reduced to $15 an hour. At the time, Jones was receiving more than $21 but less than $22 an hour. Jones further testified that Mays instructed him to speak to the unit employees about the wage decrease and to find out which of the employees would be willing to accept it.

Pursuant to Mays' direction, Jones informed the employees of the Respondent's decision to reduce the contract wages so that it could remain competitive. Jones stated he did so in order to determine ''who was going to stay and who was going to go.'' Because he failed to receive a definitive response from the employees, Jones never reported back to Mays.

When Jones received his decreased paycheck at the end of the first week in January 1991, he decided he could not accept the lower wages. Jones then went to the Union to request that he be dispatched to another job. When questioned about his reasons for the request, Jones informed the Union about the Respondent's decision to pay the unit employees less than the contract wage rates. He also informed the union officials at that time about the change in the method of payment of wages which the Respondent instituted in May 1990. As a result of this information, the Union initiated an investigation concerning the Respondent's failure to pay the contract wages. In addition, the Union Trust Funds conducted an audit of the Respondent's reports of the hours worked by the unit employees and the payments, based on those hours, to the various contract funds.

Melvin Unphenour, the fringe benefit compliance officer for the Funds, testified he performed an audit of the Respondent's reports and payments. According to Unphenour, he not only examined the reports submitted by the Respondent and payment records covering May through December 1990,[5] but also visited a number of the jobsites listed in the reports to determine the man-hours necessary to perform the

[2] Consistent with the custom in the building and construction industry, the collective-bargaining agreement here provided for the use of union members as foremen by signatory employers under specified conditions. See G.C. Exh. 3, art. VIII.

[3] It was one of Jones' duties as the foreman to hand out the weekly wages to the employees who worked on his crew.

[4] Mays did not testify in these proceedings.

[5] See G.C. Exhs. 6–10.

plastering work.[6] Based on this information, Unphenour stated he determined that the Respondent understated the employee hours worked over this period and , as a result, underpaid the Benefit Funds by approximately $8000.

Concluding Findings

The Respondent did not offer any evidence nor present any witnesses in this proceeding. The Respondent contends, however, that the General Counsel has failed to establish by a preponderance of the evidence that its conduct violated the Act. I find the Respondent's arguments to be without merit.

First, it is clear from the unrefuted testimony of Jones, which I credit, that commencing January 1, 1991, the Respondent unilaterally decreased the hourly wage rates of the unit employees to an amount less than the wage rates required by the collective-bargaining agreement in effect between the Respondent and the Union. It is without question settled law that an employer's midterm modification of an existing collective-bargaining agreement without the consent of the unit employees' bargaining representative constitutes a violation of Section 8(a)(5) of the Act. *Speedtrack, Inc*., 293 NLRB 1054 (1989). Accordingly, I find the Respondent has violated Section 8(a)(5) and (1) of the Act by engaging in this conduct.[7]

The second question to be addressed here is whether the Respondent, in the course of unlawfully reducing the wages, bypassed the Union and engaged in direct dealing with the unit employees. Although the answer is not a difficult one based on the record in this case, it is unnecessarily complicated by the manner in which this violation is alleged in the complaint.

Paragraph 8(c) of the complaint alleges, in essence, that since late September 1990 the Respondent, acting through Mays and Jones, bypassed the Union and engaged in direct dealing by telling the unit employees they would receive all their wages in cash, they would be paid reduced wages, and that benefit contributions would no longer be paid. Other than the conduct in late December 1990 concerning the reduced wages, there is nothing in this record which remotely suggests the employees were told all their wages would be paid in cash or that their benefit contributions would no longer be paid. In view of this, these portions of paragraph 8(b) are dismissed.

Regarding the Jones' statements to the employees in late December 1990, I find the record warrants a finding of direct dealing with the employees and a bypassing of the Union in violation of the Act. It is unrefuted that Jones, an admitted supervisor and agent of the Respondent, was instructed by his superior, Mays, to inform the employees that their wages would be reduced from the contract rate starting in January 1991. In carrying out these instructions by speaking to the employees, it is clear that Jones was acting in accord with the Respondent's intent to completely ignore the Union and deal directly with the employees. Indeed, as Jones stated, he ''wanted to know who was going to stay and who was going to go.'' At no time was any effort made to first notify the Union and seek to negotiate for consent to the wage reduction. Rather, the Respondent, through Jones, went directly to the employees and informed them of a fait accompli.

The Board case law has consistently held that where an employer attempts to circumvent or, as the facts demonstrate here, completely ignore the bargaining representative and deal directly with the employees on matters encompassed in the bargaining relationship, it undercuts the ability of a union to function as the bargaining representative and interferes with the employees' right to representation by a union. This is true whether it concerns a decision which is contemplated or whether it concerns a decision, as here, that has already been made by the employer. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Ad-Art, Inc*., 290 NLRB 590 (1988); and *General Electric Co*., 150 NLRB 192, 195 (1964).

In these circumstances, I find that by failing to notify and bargain with the Union, as the exclusive representative, concerning the wage reduction and by directly informing the employees that their wages would be reduced commencing January 1991, the Respondent has violated Section 8(a)(1) and (5) of the Act.

The final question to be resolved here is whether, commencing May 1, 1990, the Repondent failed to pay the contractually required wages and make the required payments to the Benefit Funds for all the hours worked by the unit employees. This allegation is set forth in paragraph 8(a) of the complaint.

Initially, it should be noted that neither the testimony of Jones nor that of Lara demonstrates that the employees received less than the contract wages when the method of payment of the wages was changed in May. To the contrary, Jones testified that the amount he received, regardless of whether in cash or a combination of cash and check, was ''fair.'' Indeed, it was not until his wages were reduced that he complained to the Union. Similarly, Lara testified the wages he received when the method of payment changed in May was the net amount he was entitled to receive for the hours he worked. The clear implication of this testimony is that the unit employees were still being paid at the contract rate even though they were now receiving their wages in cash or a combination of cash and check. The only complaint expressed by the witnesses was that the cash portion of the wages did not reflect any deductions from the gross wages earned. Other than the testimony of these witnesses, the General Counsel presented no probative evidence to establish that the unit employees were paid less than the contract wage rates until the wage reduction was implemented in January 1991.

It follows, from the above, that the record evidence does not support this portion of the allegation contained in paragraph 8(a) of the complaint. Accordingly, it is dismissed.

Turning to the issue of the failure to pay the fringe benefit contributions for all the hours the unit employees worked

[6] Unphenour, a lather by trade, was an experienced estimator in the construction industry. Although the Respondent's jobs he inspected were completed at the time, Unphenour stated that by determining the square footage of plastering work and applying the standards devised by the industry he was able to determine the number of plastering hours required to perform the work within a margin of 8 percent.

[7] The complaint allegation concerning this conduct (par. 8(b)) also asserts the Respondent failed to make fringe benefit contributions for the unit employees at the time it reduced the wages. I find no evidence in the record to support this portion of the allegation. In the absence of specific evidence, it does not follow that the unlawful reduction in wage rates was neccessarily accompanied by a failure to make fringe benefit contributions.

commencing in May 1990, I find the record fully demonstrates the Respondent understated the hours worked and thus failed to pay the correct amounts to the Benefit Funds on behalf of the employees. First, I find the testimony of Unphenour, the compliance officer for the Funds, to be credible and worthy of belief. I found this witness to be forthright and candid. Thus, based on his experience in the construction industry and as an estimator applying industry standards, and buttressed by the Respondent's own reports to the Funds and the reports of the bank as reflected in the Funds' records, Unphenour concluded the Respondent understated the hours and underpaid the Funds by $8000. I find this evidence was sufficient to establish a prima facie case of a violation of the Act. This is especially true because the Respondent failed to present any evidence whatsoever to rebut this prima facie case. Indeed, pursuant to a subpoena request by the General Counsel at the hearing, the Respondent asserted it did not have the original timecards of the employees—which normally would be in its possession or available to it. Presumably the production of the timecards would have accurately established the number of hours the unit employees worked on the various jobsites during the period in question.

In the absence of any evidence to rebut the General Counsel's prima facie case, I find the record here warrants the conclusion that the Respondent failed to report and make payment for all the hours worked by the unit employees to the trust funds as required by the collective-bargaining agreement. ''It is well established Board law that an employer's refusal to make required payments to an insurance or trust fund established by a collective-bargaining agreement . . . constitutes a unilateral change in terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act.'' *Merryweather Optical Co*., 240 NLRB 1214, 1215 (1979). Accordingly, I find that by this conduct the Respondent has violated Section 8(a)(5) and (1) of the Act.[8]

CONCLUSIONS OF LAW

1. The Respondent, Master Plastering Company, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Plasterers Local 2, Operative Plasterers and Cement Masons International Association, AFL–CIO, is a labor organization within the meaning of Section 2(5) of Act.

3. By unilaterally implementing a decision to pay unit employees less than contract wage rates, beginning January 1, 1991, during midterm of an existing collective-bargaining agreement between it and the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By informing the unit employees they were going to be paid less than contract wage rates beginning January 1991 without first notifying and obtaining consent of the Union, as the exclusive representative, the Respondent engaged in direct dealing with its employees and bypassed the exclusive collective-bargaining representative in violation of Section 8(a)(5) and (1).

5. By failing to make required fringe benefit contributions for all hours worked by bargaining unit employees commencing on May 1, 1990, and continuing thereafter, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist from such conduct and to take such affirmative action necessary to effectuate the policies of the Act.

Based on the finding that the Respondent unlawfully modified the collective-bargaining agreement by unilaterally decreasing the contractually required wage rates for unit employees beginning in January 1991, it shall be ordered to restore the wage rates required by the collective-bargaining agreement and make the employees whole for any loss of earnings they have incurred because of this unilateral change. The loss of earnings shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having also found the Respondent unlawfully bypassed the Union, as the exclusive representative of the unit employees, and engaged in direct dealing with the employees concerning the reduction of their contract wages, it shall be ordered to first notify the Union and bargain, on request, concerning any modification in the existing collective-bargaining agreement covering the unit employees and, if an understanding is reached, to embody such understanding in a signed agreement.

Because it has been found that the Respondent failed to make the fringe benefit contributions required by collective-bargaining agreement for all the hours worked by the unit employees, beginning on May 1, 1990, and continuing thereafter, it shall be ordered to commence the required payments to the various funds and to transmit to the Funds the contributions it failed to make since its unlawful conduct on May 1, 1990. Interest on these payments to the Funds shall be determined in the manner prescribed in *Merryweather Optical Co*., supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Master Plastering Company, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing a decision to pay its employees less than the contract wage rates during the term of an existing collective-bargaining agreement in effect between it and Plasterers Local 2, Operative Plasterers and Cement Masons International Association, AFL–CIO.

(b) Dealing directly with unit employees and bypassing the above-named Union, by informing the employees that they were going to be paid less than the wages required by the

[8] Because the state of the record is such that a precise determination of the amount of understated hours and underpayment to the Funds cannot be ascertained here, this determination is left to the compliance portion of this proceeding.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

contract without first notifying and bargaining with the Union as their exclusive representative.

(c) Failing and refusing to make required payments on behalf of its unit employees to the Union Trust and Fringe Benefit Funds for all the hours worked, as required by the existing collective-bargaining agreement.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Resume payments to the contractually designated fringe benefits funds on behalf of the unit employees and make the contributions it failed to pay to the Funds as a result of the unlawful understatement of the hours worked by the employees.

(b) Make the unit employees whole for all loss of earnings they may have suffered by reason of the unilateral change in the amount of their contractually required wages, with interest as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Los Angeles, California, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT make unilateral changes in the wage rates or other terms of our existing collective-bargaining agreement with Plasterers Local 2, Operative Plasterers and Cement Masons International Association, AFL–CIO covering our employees.

WE WILL NOT deal directly with our employees and bypass the above Union, which is the exclusive collective-bargaining representative of our employees.

WE WILL NOT unilaterally pay our employees wages less than the wages required by our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make our employees whole for any loss of earnings, with interest, they may have suffered by reason of our unilateral reduction of their wages beginning the first week in January 1991.

WE WILL make our employees whole, with interest, for any losses or expenses they may have suffered as a result of our understatement of the hours they worked, commencing May 1, 1990, and our underpayment on to the Fringe Benefit Funds.

WE WILL make the required payments on behalf of our unit employees to the union fringe benefit funds and WE WILL pay into those funds the contributions we failed to make as a result of our unlawful understatement of the hours our unit employees worked.

MASTER PLASTERING COMPANY